

The ALRC Freedoms Inquiry, real property and environmental law

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Introduction

On 2 March 2016, the final report of the Australian Law Reform Commission's (ALRC) "Freedoms Inquiry" *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*¹ (Report) was launched at Parliament House, Canberra by the Commonwealth Attorney-General the Hon George Brandis. Almost 2 years in the making, this "doomsday book"² comprises a "vast body of work"³ that is "singularly different and distinctive from other ALRC inquiries".⁴ The President of the ALRC remarked that this "extraordinarily challenging" inquiry involved identifying Commonwealth laws that encroach upon 19 "traditional rights and freedoms" as specified in the extensive terms of reference. "The canvas was a wide one"⁵ and the 20 chapters of this Report do indeed cover exceptionally broad terrain "unprecedented in scale and importance".⁶ Part-time Commissioner Suri Ratnapala distinguished the focus of this Report from all other law reform inquiries in that the "Freedoms Inquiry" is concerned with the "general health of our law measured against the timeless norms and values that have been winnowed by our history and legal tradition".⁷

The "traditional rights and freedoms" examined in the Report include:

- the freedoms of speech, religion, association, assembly and movement;
- the rights and privileges concerning a fair trial, the burden of proof, strict and absolute liability, self-incrimination, legal professional privilege, retrospective laws, procedural fairness, judicial review, immunity from civil liability;
- the delegation of legislative power; and
- property rights generally, personal and real.

This article provides an overview of one particular area of its attention — property rights and the extent to which Commonwealth laws regulating land and water use interfere with them, if at all, legitimately or otherwise.

The premise of the Report

The premise of the terms of reference with regard to its treatment of property is that the private/public dichotomy is actual, desirable and imbalanced. It is a dichotomy that is fundamental to the taxonomy of law itself, if not necessarily to its practice. The private/public dichotomy provides the intellectual architecture⁸ of Anglo-Australian law and distinguishes it from Indigenous Australian laws which are structured differently according to concepts of connectivity and responsibility rather than separation and entitlement.⁹ It is important to also note that although the Report describes law in the language of "tradition" and "heritage", it refers not to those forged here in Australia by its First Peoples over tens of thousands of years, but to a tradition forged overseas and a heritage particular to European geographies and histories dating back less than a millennium.¹⁰ Reference is made on its first page to the Magna Carta and parliamentary sovereignty:

The rights, freedoms and privileges set out in the Terms of Reference have a long and distinguished heritage. Many have been recognised in Australia, England and other common law countries for centuries.¹¹

Like many law textbooks, the Report uses history instrumentally to lend authority to the approach taken by the ALRC to its behemoth Report.

The premise of the terms of reference is articulated by the framing of a question of whether there are laws (modern, public, statutory) that "encroach" and/or "interfere" with other laws (old, private, common). In fulfilling its obligations under the reference, the ALRC reproduces the public/private dichotomy in the structure and language of the Report. But it also presents evidence and poses questions that subtly challenge the currency and viability of this dichotomy. True to its name and function, the ALRC has published a Report that is demonstrably committed to genuine reform by situating a difficult inquiry within the tensions of the existing legal framework while simultaneously nodding to law's vital and proven capacity for change and adaptation.

Protecting rights and freedoms

With regard to the protection of real property rights, the chapter reminds readers in Ch 2 that:

- the Australian Constitution provides for “just terms” compensation to proprietors whose property rights are compulsorily acquired by the Commonwealth;¹²
- the principle of legality is underpinned by a faith that parliament would use clear and plain language if and when it intended to diminish or suspend common law “fundamental” rights;¹³
- international law provides a significant influence (if not necessarily binding legal obligations) on the esteem with which rights and freedoms are held in Australian law;¹⁴ and
- common law rights are by their nature residual in that one’s right exists to the extent that it does not impose on another’s right, and that therefore the relativity of rights precludes a legal culture of absolutism.¹⁵

Chapter 2 also captures the signature feature of the Report in its consistent and explicit engagement with the question of when and how limits on rights may be justified, largely through an application of the concept or “test” of proportionality:

... a structured proportionality analysis involves considering whether a given law that limits important rights has a *legitimate objective* and is *suitable* and *necessary* to meet that objective, and whether — on balance — the public interest pursued by the law outweighs the harm done to the individual right.¹⁶

Although the concept of proportionality, in regard to property rights, implicitly repeats and accepts the public/private dichotomy and is thus limited in terms of potential reform in the “big picture” sense, it is helpful as an accessible vocabulary through which reforms could be advanced incrementally. Well-established in constitutional jurisprudence, the ALRC endorses the use of “proportionality”, elevating it to a viable methodology in evaluating the “balance” between public/private interests, referring to it in quasi-scientific terms as a mode of analysis and a “serviceable” tool that has been used “around the world for decades”.¹⁷

The Report also refers to the use of the concept of proportionality in the domestic context of the scrutiny processes and review mechanisms instituted in Australian law including various parliamentary committees, statutory commissions and legislative drafting, consultation and review. Notwithstanding its preference for proportionality as a guiding concept or “test” in its approach to a very large and fundamental question about the legal organisation and distribution of responsibilities

and entitlements, the ALRC acknowledged substantial concerns and critiques of the concept. Legal scholarship is used in the Report to present these concerns critically, in terms of the gap between the appearance of proportionality as a test or “algorithm” and its practical requirement to apply subjective, moral judgment to questions without fact-based and “forensically ascertainable” answers.

The chapter acknowledges that it is not necessary to find “a perfect method — if such a method exists — for testing the justification of laws that limit rights”.¹⁸ The entire topic of the Report may be “a question about which reasonable people acting in good faith disagree”.¹⁹ Accordingly, the ALRC concludes that although a “rigid insistence on a prescribed proportionality framework may ... discourage more thorough and wide ranging analysis”,²⁰ the proportionality approach is nonetheless “valuable” because it presupposes that the regulatory interference with rights should only occur when “truly necessary”.²¹ In setting out these methodological preferences early on, the ALRC indicates that its approach to the Report is consistent with the premise of the terms of reference — that the private/public dichotomy exists, is legitimate and ought to be balanced or rather, the hierarchy restored.²²

Property rights — in theory

The final three chapters of the Report deal with property rights. Chapter 18 considers property rights in terms of their versatility, relativity and protection from statutory encroachment. Chapter 19 deals with personal property rights and is not dealt with in this article. Chapter 20 considers real property rights and is discussed below.

Chapter 18 opens with references to 17th and 18th century scholars who transformed the way property was conceived from land as status, to land as capital. Bentham, Blackstone and Locke are used to provide historical legitimacy to the premise of modern liberal thought — that private property and law are necessarily and mutually constituted. The chapter swiftly moves on to outline key developments in mainstream property discourse including the notions of a bundle of rights, copyright and native title. With regard to the ongoing development of real property, the chapter quotes Peter Butt as noting “categories of interests in land are not closed” as they “change and develop as society changes and develops”.²³ Here, the Report provides a critical but easily forgotten insight into proprietary interests in land — they are versatile. The versatility of property interests is particularly important in the consideration of the compatibility and connectivity of property interests in land with environmental responsibilities.

Chapter 18 also considers the relativity of property rights, reminding us that the operation of property rights in Australian law involves an acceptance of the notion of “priorities”. The rules of priorities determine which rights prevail over other rights. “Each circumstance may involve a ‘loser’ in the sense of someone losing out in a contest of proprietary rights.”²⁴ The point is made that property rights are never absolute — rather they are subject to the rights of others and to established rules of priorities. Property rights are lost in other ways too. This chapter outlines occasions when property rights are forfeited completely according to adverse possession²⁵ — when they are diminished by the interests in water, minerals below and airspace above the land being legally separated from the ownership of the land.²⁶

Chapter 18 sets out the existing protections of private property rights from public regulation through “statutory encroachment” — an expression that suggests the priority of private law and the possibility of the impropriety of public law. In this way, the language and structure of the Report reproduce not only the private/public dichotomy but also the established political hierarchy that it underpins.

Beginning with the encroachment of property rights that is protected outright in Australian public law, the acquisition of property by the Commonwealth,²⁷ the chapter then draws attention to the political origins of this protection of private property rights by contrasting the Fifth Amendment of the United States Constitution which was designed as a limit on state power, to s 51(xxxi) of the Australian Constitution which was designed as a grant of state power.²⁸

The most important contribution of the chapter is its attention to the question of whether Australia should broaden its definition of interference (to non-acquisitive interference). The Report refers to the American jurisprudence of “takings” which sets a lower threshold to activate constitutional protections of private property rights. Quoting the part-time Commissioner overseeing the Report, Emeritus Professor Suri Ratnapala, the Report presents the view that private property rights are “encroached” if not formally “acquired” by Regulations concerning land zoning, for example, without compensation despite “diminish[ing] the exchange value of property”.²⁹

Chapter 18 also introduces the question of whether property rights are human rights, principally in a section dealing with international law.³⁰ A question is raised whether such “rights” are equally adversely diminished by expropriatory and “merely regulatory” public law.³¹ A further question is raised as to whether there is a distinction to be made between human rights of a universal application and rights of non-universal application to the smaller social category of private proprietors.

The chapter concludes with an analysis of the “justifications for interferences”. It states the common law presumption that:

... the power of parliament to encroach upon property rights was subject to the qualification that any deprivation was not arbitrary and only occurred where reasonable compensation was given. ... [and when] the action was necessary and in the public interest.³²

Importantly, the ALRC assures us that the authority of parliament to enact laws “is not in issue”.³³ The question is not the legitimacy of public law but the legitimacy of its objectives where they arguably “interfere with, or affect, property rights” and whether the public interest “outweighs the harm done to the individual right”.³⁴

The application of the proportionality test to the relationship between private property and public interest thus begins in a subsection entitled “Legitimate objectives”. The legitimacy of the objectives of public laws that affect real property rights involve “distinguishing ‘regulation’ or ‘control’ from ‘acquisition’, ‘deprivation’ or ‘taking’ [and are] generally intertwined with the question of compensation”.³⁵ The enormity of the challenge is neatly framed by Kevin Gray: “The precise location of the threshold where regulation shades into confiscation is one of the most difficult questions in modern law.”³⁶ It is to this most difficult question that the ALRC turns its attention in the final chapter of its magnum opus.

Property rights — in land

Chapter 20 is the second longest chapter³⁷ of the Report and, together with Ch 18, constitutes the largest item of attention in the Report. The chapter is structured into three sections:

- protections from statutory encroachments;
- justifications for limits on real property rights; and
- laws that interfere with real property rights (environmental laws is listed as the first of three laws in the category).

At the outset of the chapter, some clarifications are made. First, that “interference” and “encroachment” are almost synonymous with the “reduc[ed] ... commercial uses to which [the] property can be [prospectively] applied”.³⁸ Second, although the Report does not deal with the laws of Australian states and territories, these laws are responsible for the vast majority interferences with property rights. However, the Report observes that from landholders’ perspectives, the architecture of federalism does not remove the practical responsibility of the Commonwealth for such interferences, given the increasingly complex relationships between state and

federal laws, policies and funding arrangements.³⁹ It is at this point the chapter returns to when representing the perspectives and submissions of rural and regional landholders. Third, the “*EPBC Act* interferes with the right to use land — but only to a limited extent”.⁴⁰ The chapter explains that the operation of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (*EPBC Act*) is limited to:

- proposed changes to land use, rather than current land use practices; and
- land use likely to have a “significant” impact on “a matter of national environmental significance”.⁴¹

The chapter also corrects any misunderstanding about the frequency of *EPBC Act* restrictions of land use practices, noting that “very few proposals have been refused”.⁴² Quoting the Commonwealth Department of the Environment figures that since the commencement of the *EPBC Act* in 2000, 799 proposed actions “have been approved and only 11 have been refused”.⁴³ It also cites a relevant stakeholder perspective on this point, from the Australian Network of Environmental Defenders Offices that:

... it is difficult to argue that the requirement to obtain a permit for an action that is likely to have a significant impact on a matter protected under international law constitutes an undue burden on private property holders.⁴⁴

The second section of Ch 20 “Justifications for limits on real property rights” presents an analysis of the topic using the “test” of proportionality. It groups together various stakeholders into “those who emphasised an environmental perspective and those who emphasised a private property perspective”.⁴⁵ Given the size and resources of the relevant key organisations, the perspective of farmers might well be conflated with that of the peak industry lobby group for primary producers, the National Farmers’ Federation (NFF). For the purposes of writing a report of the magnitude of the Freedoms Inquiry, it makes sense to group stakeholders together this way, but it is worth noting that perspectives on this question are perhaps more complex than the binary structure might first indicate.⁴⁶

This section works through several justifications for limits on real property rights:

- international obligations;⁴⁷
- public interest in health and environmental protection;⁴⁸
- adequacy of existing protections of private property rights;⁴⁹
- economic arguments (pertaining to compensation and the polluter-pays/beneficiary-pays debate);⁵⁰
- that property rights are a different order of rights from human rights;⁵¹ and finally

- proportionality.⁵²

The framing of the section using the language of “limits on real property rights” rather than “interferences with property rights” works effectively and consistently with the legal analysis of property rights generally in Ch 18. In that chapter, readers were reminded that property rights are not absolute between themselves and against non-proprietary interests. Preferring “limits” to “interferences” thus reflects more accurately the legal analysis and moves the debate into a broader perspective about interests in land.

The final section of Ch 20 conducts an analysis of a range of Commonwealth laws that “may be characterised as interfering with vested property rights”⁵³ without deciding whether these are justified. The chapter discusses environmental laws, native title laws and criminal laws. Having nominated 60 Commonwealth environment-related statutes in force, the discussion of environmental laws that interfere with real property rights is 20 pages long and focuses on the *EPBC Act* and the *Water Act 2007* (Cth).

The chapter elaborates on an earlier point that the *EPBC Act* is modest in the sense that it is concerned with prospective rather than current land use practices. “There are not even provisions in the legislation which allow existing uses to be terminated on payment of compensation, unless the land itself is compulsorily purchased.”⁵⁴ The Report noted that although unlikely, if compensation were built in to the *EPBC Act* for non-acquisitive limits imposed on prospective land use, it could be creatively calculated (using rebates on council rates, land tax, income tax and subsidies on interest rates, herbicides and so on) or mitigated by expansion of offset measures.⁵⁵ However, the Report cites Emeritus Professor David Farrier that there is no legal right of development for any proprietor and that the creation of one, in any form, would set new (expensive) precedents (particularly in urban contexts).⁵⁶ In his view, compensation “for lost expectations” is outdated and less effective than “payments for active management by landowners to advance biodiversity conservation objectives”.⁵⁷

The ALRC does not conclude whether compensation is desirable, but it does recommend that the next scheduled review of the *EPBC Act* in 2019 “could reassess whether interferences with property rights are proportionate and could explore a range of compensatory mechanisms”.⁵⁸ It recommends that the “interrelationship of Commonwealth and state laws” could be considered in the same process.⁵⁹ The Report is balanced in its presentation of stakeholder perspectives — it makes extensive use of various and conflicting submissions and uses language both consistent with its

reference, framing complex questions in terms of public/private dichotomy, and that also challenges the status quo,⁶⁰ as a law reform commission should.

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Footnotes

1. Australian Law Reform Commission *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* Final Report ALRC Report 129 (2015) www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf.
2. The Hon G Brandis QC “Address at the launch of the Australian Law Reform Commission report on Traditional Rights and Freedoms” speech delivered at the launch of ALRC Report No 129, Parliament House, Canberra (2 March 2016) www.attorneygeneral.gov.au/Speeches/Pages/2016/FirstQuarter/2-March-2016-Address-at-the-launch-of-the-Australian-Law-Reform-Commission-Report-on-Traditional-Rights-and-Freedoms.aspx.
3. Above n 2.
4. Professor R Croucher AM “Launch of ALRC Report 129, Traditional Rights and Freedoms — Encroachments by Commonwealth Laws: summary of the report” speech delivered at the launch of ALRC Report No 129, Parliament House, Canberra (2 March 2016) www.alrc.gov.au/news-media/speech-presentation-article/launch-alrc129.
5. Above n 4.
6. Emeritus Professor Suri Ratnapala speech delivered at the launch of ALRC Report No 129, Parliament House, Canberra (2 March 2016) www.alrc.gov.au/news-media/speech-presentation-article/launch-alrc129.
7. Above n 6.
8. N Graham “This is not a thing: land, sustainability and legal education” (2014) 26(3) *Journal of Environmental Law* 395 at 399–409.
9. N Graham *Landscape: Property, Environment, Law* Routledge, 2011 pp 97–103, 197–202.
10. Above n 1, at 29.
11. Above n 1, at 29.
12. Section 51(xxxi) cited in above n 1, at 32.
13. Above n 1, at 36–38.
14. Above n 1, at 38–40.
15. Above n 1, at 40–41.
16. Above n 1, at 45.
17. Above n 1, at 45.
18. Above n 1, at 50.
19. Above n 1, at 50.
20. Above n 1, at 50.
21. Above n 1, at 13.
22. For a discussion of the hierarchical ordering of private and public law, see above n 8, at 402.
23. P Butt “Carbon sequestration rights — a new interest in land?” (1999) 73 *Australian Law Journal* 235, cited in above n 1, at 465.
24. Above n 1, at 467.
25. Above n 1, at 467.
26. Above n 1, at 468.
27. Above n 1, at 477.
28. Above n 1, at 477.
29. S Ratnapala and J Crowe *Australian Constitutional Law: Foundations and Theory* (3rd edn) Oxford University Press, 2012) [15.4.2.2], cited in above n 1, at 481.
30. Above n 1, at 486–89.
31. See K Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 *Environmental and Planning Law Journal* 161 at 166.
32. Above n 1, at 489.
33. Above n 1, at 490.
34. Above n 1, at 490.
35. Above n 1, at 491.
36. Above n 31, at 186, quoted in above n 1, at 491.
37. The longest chapter at 51 pages is Ch 4 Freedom of Speech. Chapter 20 is 49 pages.
38. Above n 1, at 522.
39. Above n 1, at 522.
40. Above n 1, at 522.
41. Above n 1, at 522. See also pp 548, 549 and 553.
42. Above n 1, at 522.
43. Commonwealth Department of Environment *Annual Report 2014–2015* (2015) 200 www.environment.gov.au/system/files/resources/34f17bb2-3ccb-4bc6-8d3d-2f1d1485c778/files/14-15-annrep-full.pdf, cited in above n 1, at 553.
44. EDOs of Australia “Submission to the Australian Law Reform Commission on Traditional Rights and Freedoms — Encroachments by Commonwealth Laws: Interim Report” Submission 121 (2015) 4 www.alrc.gov.au/sites/default/files/subs/121._org_submission_final_edos_of_australia_submission_final.pdf cited in above n 1, at 553, fn 240.
45. Above n 1, at 538.
46. See R Bartel “Vernacular knowledge and environmental law: cause and cure for regulatory failure” (2014) 19(8) *Local Environment: The International Journal of Justice and Sustainability* 891; and L Botterill “Policy change and network termination: the role of farm groups in agricultural policy making in Australia” (2005) 40(2) *Australian Journal of Political Science* 207.
47. Above n 1, at 539.
48. Above n 1, at 539–40.
49. Above n 1, at 540.
50. Above n 1, at 541–42.
51. Above n 1, at 543–44.
52. Above n 1, at 544–45.

53. Above n 1, at 545.
54. Emeritus Professor D Farrier “Comments on the Australian Law Reform Commission’s interim report on Traditional Rights and Freedoms — Encroachment by Commonwealth Laws” Submission 126 www.alrc.gov.au/inquiries/freedoms/submissions, quoted in above n 1, at 548.
55. Above n 1, at 555, citing N McNamara “A home is no longer a castle? Real property rights in the context of mining and environmental claims” speech delivered at the ALRC Freedoms Symposium, Federal Court of Australia, Brisbane (2 September 2015).
56. Above n 1, at 554.
57. Emeritus Professor D Farrier, above n 54, quoted in above n 1, at 556.
58. Above n 1, at 556.
59. Above n 1, at 556.
60. The subsection “Redressing the *perceived* interference with property rights” (emphasis added) is exemplary in this regard.